(2)

No. 92-74

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

DEPARTMENT OF REVENUE OF THE STATE OF OREGON, and RICHARD A. MUNN, in his capacity as Director of the Department of Revenue of the State of Oregon,
Petitioner,

v.

ACF INDUSTRIES INCORPORATED, GENERAL AMERICAN TRANSPORTATION CORPORATION, GENERAL ELECTRIC RAILCAR SERVICES CORPORATION, PULLMAN LEASING COMPANY, RAILBOX COMPANY, RAILGON COMPANY, TRAILER TRAIN COMPANY, and UNION TANK CAR COMPANY,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Respondents re-state the Question Presented as follows:

Was the Court of Appeals wrong in holding, as have all other Courts of Appeal to have considered the question, that the imposition of a property tax on railroad personal property violates Section 306(1)(d) of the Railroad Revitalization and Regulatory Reform Act of 1976 when significant amounts of other commercial and industrial tangible personal property are not taxed due to statutory exemptions?

LIST OF PARTIES TO THIS PROCEEDING AND RULE 29.1 STATEMENT

The petitioner is the Department of Revenue of the State of Oregon (hereinafter referred to as the "Department").

Respondent ACF Industries, Incorporated is a wholly-owned (99%) subsidiary of Icahn Holding Corporation, which is owned by Carl C. Icahn.

Respondent General American Transportation Corporation is a wholly-owned subsidiary of GATX Corporation. Except for wholly-owned subsidiaries, General American Transportation Corporation does not hold a direct majority interest in any other corporation.

Respondent General Electric Railcar Services Corporation (now General Electric Railcar Leasing Services Corporation) is a wholly-owned subsidiary of General Electric Capital Corporation, which is a wholly-owned subsidiary of General Electric Financial Services, Inc., which is a wholly-owned subsidiary of the General Electric Company.

Itel Rail Corporation, successor-by-name-change to plaintiff Pullman Leasing Company, is a wholly-owned subsidiary of Itel Corporation.

Respondent Union Tank Car Company is a wholly-owned subsidiary of Marmon Industrial Corporation, which is a wholly-owned subsidiary of GL Sub Co., which is a wholly-owned subsidiary of Marmon Holdings, Inc.

Respondents Railbox and Railgon are wholly-owned subsidiaries of plaintiff Trailer Train Company (now TTX Company). TTX Company's shareholders are:

Atchison, Topeka & Santa Fe Ry. Co.
Boston & Maine Corporation
Burlington Northern Railroad Co.
Chicago & North Western Trans. Co.
Consolidated Rail Corporation
CSX Corporation
Florida East Coast Ry. Co.
Grand Trunk Western R.R. Co.
Illinois Central Gulf R.R. Co.
Kansas City Southern Ry. Co.
Norfolk Southern Corporation
Richmond, Fredericksburg & Potomac R.R. Co.
Rio Grande Industries, Inc.
Soo Line R.R. Co.
Union Pacific Corporation

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OPINIONS BELOW

The opinions below are adequately identified in the Petition.

JURISDICTION

The jurisdictional grounds are adequately stated in the Petition.

STATUTORY PROVISION INVOLVED

The statute involved is Section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4-R Act), Pub. L. No. 94-210, 90 Stat. 54 (Feb. 5, 1976) ("Section 306"). Section 306 was originally codified at 49 U.S.C. §26c, and its language was slightly altered when recodified at 49 U.S.C. §11503. The codification is not to be construed as making any substantive changes. *See* §3(a), 92 Stat. 1466. The Department sets forth the text as recodified in the body of its Petition but attaches both the original and the recodified texts as Appendices. Respondents, like the Ninth Circuit, will rely exclusively on the original language of Section 306 to avoid any potential distortion of the meaning of the original enactment. *See* App-2, note 1.[1]

STATEMENT OF THE CASE

Respondents (hereinafter referred to as "Carlines") amend and expand upon the Department's Statement of the Case as follows.

1. The Petition's summary of the legislative purpose of Section 306, contained in Section 1 of its Statement of the Case, is incomplete. The effort to minimize the importance of Section 306 as but "one small part" of the 4-R Act is contradicted by the unequivocal language of Section 306 and the broad construction of Section 306 afforded by the courts.

[1] A copy of Section 306 appears as Appendix D to the Petition.

Section 306 was enacted as part of a comprehensive congressional plan to revitalize the nation's railroads and to strengthen its transportation system. After more than 15 years of investigation, various congressional committees and study groups concluded that state tax discrimination against railroads was pervasive and constituted an undue burden upon interstate commerce; that state laws which guaranteed equal tax treatment for railroads had not been observed; and that state administrative and judicial remedies had not afforded railroads an adequate means of obtaining relief from discriminatory state taxation. The committees recommended that Congress establish a clear federal policy against discriminatory state taxation of railroads and create an efficient federal judicial remedy to enforce such a policy against the states. *See Atchison, Topeka & Santa Fe Ry. Co. v. Board of Equalization*, 795 F.2d 1442, 1443, n.2 (9th Cir. 1986), *vacated on other grounds*, 828 F.2d 9 (9th Cir. 1987), and authorities cited therein. *See also Burlington Northern Railroad Company v. Oklahoma Tax Commission*, 481 U.S. 454, 456 (1987).

Declaring state tax discrimination against transportation property to be "an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce", Section 306 confers jurisdiction upon district courts of the United States, notwithstanding 28 U.S.C. §1341 and without regard to amount in controversy or citizenship of the parties, to "grant such mandatory or prohibitive injunctive relief, interim equitable relief, and declaratory judgments as may be necessary to prevent, restrain or terminate any acts in violation of [Section 306]." *See* Section 306(2).

2. The case was submitted to the courts below on a comprehensive Stipulation of Facts which shows that the Carlines' railroad personal property is fully taxed, but significant amounts of commercial and industrial tangible personal property in Oregon are not. The parties stipulated to facts showing that approximately 75% of the value of commercial and industrial personal property in Oregon is not taxed for various reasons, but primarily because of the statutory exemption of major classes of commercial and industrial personal property, such as business inventories, farm machinery and equipment, and motor vehicles. A stipulated $9.7 billion in value of commercial and industrial personal property is exempt from taxation, while only $4.8 billion of such property remains subject to tax.[2] Although the underlying facts were stipulated below, the parties disagreed as to how the level of discrimination should be calculated. Assuming the resolution of all these calculation disputes in favor of the Department, the Ninth Circuit observed that 25% of all commercial and industrial property, both real and personal, is exempt.

3. The Carlines sought relief under Section 306(1)(d), which prohibits the "imposition of any other tax which results in discriminatory treatment of a common carrier by railroad." The Carlines claimed, and the Ninth Circuit agreed, that the imposition of property taxes on their rail cars[3] results in discrim-

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[2] *See* Ninth Circuit's Table at App-18.

[3] Although the Carlines furnish and lease rail cars to the railroads, the Carlines are not themselves "railroads." Section 306(1)(d) prohibits taxes which result in discrimination against "railroads." The great weight of authority holds that Section 306(1)(d) prohibits the discriminatory taxation of Carlines because of the close relationship between the Carlines and the railroads. The Ninth Circuit adopts that view. *See* App-7, footnote 2. The Department now concedes the point. *See* Pet., p. 5, footnote 5.

inatory treatment in violation of Section 306(1)(d) in light of Oregon's statutory exemption scheme.

In summarizing the Ninth Circuit's opinion, the Department isolates a narrow portion of the holding but overlooks the fact that the opinion expressly follows the unanimous federal appellate authority governing analysis of discrimination under Section 306(1)(d). The Ninth Circuit's opinion joins the other circuits in finding discrimination by exemption subject to Section 306(1)(d) and in enjoining the continued taxation of Carline property in a case where substantial commercial and industrial property likewise enjoys complete exemption.

REASONS FOR DENYING THE WRIT

Certiorari should be denied because Petitioner fails to show why the case warrants review.

Certainly the argument that the Ninth Circuit has incorrectly applied Section 306(1)(d), even if it were true, presents no basis for certiorari. Neither conflict in the circuits nor other special or important reason exists for granting the writ.

The Ninth Circuit has not departed from the case law of the other circuits. Its opinion explicitly follows and builds upon the prior holdings of the most apposite cases under Section 306. At best, Petitioner simply foresees a "developing" conflict primarily by comparing the case below to cases under totally dif-

ferent facts, and predicting its application to future fact patterns. This is not a true conflict.

Moreover, the decision below is correct. Section 306 is broad, remedial legislation, enacted by Congress to effectuate national transportation policy pursuant to its plenary constitutional authority over interstate commerce.[4] The courts, including this Court, have uniformly construed Section 306 in light of its unequivocal language and remedial purposes to prohibit tax discrimination against railroads and rail property in all of its guises. In over a decade of litigation under Section 306 the circuits have disagreed on the meaning of Section 306 but once. That conflict was promptly resolved by this Court in favor of a plain reading of Section 306.[5] Since that time, the courts have considered a myriad of factual patterns on a case-by-case basis but have been remarkably consistent in announcing governing principles. A well developed and consistent body of precedent exists upon which particular cases such as this may be decided.[6]

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[4] This case does not involve the balance between state taxing authority and federal constitutional limitations on the states. Congress has itself struck the balance here. The sole issues presented here concern how an absolute congressional prohibition on tax discrimination is to be applied in the particular factual situation presented.

[5] *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, 481 U.S. 454 (1987).

[6] *Burlington Northern Railroad Company v. City of Superior, Wisconsin*, 932 F.2d 1185 (7th Cir. 1991); *Trailer Train Company v. State Tax Commission*, 929 F.2d 1300 (8th Cir.), *cert. denied*, 116 L.Ed.2d 133 (1991); *Trailer Train Company v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied sub nom. Boehm v. Trailer Train Company*, 490 U.S. 1066 (1989); *Department of Revenue, State of Florida v. Trailer Train Company*, 830 F.2d 1567 (11th Cir. 1987); *Kansas City Southern Railway Company v. McNamara*, 817 F.2d 368 (5th Cir. 1987); *General American Transportation Corporation v. Commonwealth of Kentucky*, 791 F.2d 38 (6th Cir. 1986); *Trailer Train Company v. Bair*, 765 F.2d 744 (8th Cir.), *cert. denied*, 474 U.S. 1021 (1985); *Burlington Northern Railroad Co. v. Bair*, 584 F.Supp. 1229 (S.D. Iowa 1984), *aff'd in part*, 766 F.2d 1222 (8th Cir. 1985) (other subsequent history omitted); *Southern Railway Company v. State Board of Equalization*, 715 F.2d 522 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984); *Trailer Train Company v. State Board of Equalization*, 697 F.2d 860 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983); *Atchison, Topeka and Santa Fe Railway Co. v. Lennen*, 640 F.2d 255 (10th Cir. 1981); *Ogilvie v. State Board of Equalization*, 492 F.Supp. 446 (D. N.D. 1980), *aff'd*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).

The Ninth Circuit added to that body of precedent, without departing in any significant way from it, by its holding that Section 306(1)(d) simply means what it says, and is violated under the circumstances stipulated to exist here of discrimination by extensive exemption.

1. There Is No Conflict in the Circuits.

The Petition attacks legal principles which are quite well settled. As the Petition admits, every federal appellate court to have considered the issue has concluded, contrary to the Department's position, that Section 306(1)(d) applies to cases of discrimination arising from tax exemption of other commercial and industrial property. *See, e.g., Trailer Train Company v. Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied sub nom. Boehm v. Trailer Train Company*, 490 U.S. 1066 (1989); *Department of Revenue, State of Florida v. Trailer Train Company*, 830 F.2d 1567 (11th Cir. 1987); *Burlington Northern Railroad Com-*

pany v. Bair, 766 F.2d 1222 (8th Cir. 1985); *Ogilvie v. State Board of Equalization*, 657 F.2d 204 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). The Ninth Circuit expressly follows these cases in its decision, and simply applied the existing precedent to the case before it.

Beginning with the Eighth Circuit's decision in *Ogilvie*, every federal appellate court has rejected the statutory construction arguments, raised and rejected once again below, that Section 306(1)(d) is inapplicable to property exemption cases because that subsection is limited to non-property taxes, and because exemptions are immune from scrutiny under Section 306(1)(d). The cases concerning property tax exemption which have reached the federal appellate courts, including this case, have each involved an analysis of the particular circumstances presented, but there has been no conflict on the legal principles which govern that analysis. Accordingly, this case presents no occasion for this Court's review.

2. No Special or Important Reasons Exist for Granting the Writ.

Lacking a conflict in the circuits, the Department makes three interdependent arguments in support of its Petition.

First, it argues that the case below was wrongly decided even though it follows and applies unanimous and closely applicable circuit precedent. Then, based prima ily upon the doubtful premise of such error, the Department argues that the lower courts are confused and in need of guidance. Finally, the Department portrays predicted adverse onsequence of the supposed erroneous interpretation of Section 306 below.

These arguments primarily state and restate the Department's conviction that the case below should have been decided differently. None shows a special or important reason for granting a writ of certiorari here.

Carlines will address each of these arguments in turn.

a. The Decision Below is Consistent with Section 306.

The Petition argues that the Ninth Circuit's ruling is wrong because it is contrary to both the statutory wording of Section 306 as a whole, and legislative history which supposedly shows that Congress specifically intended that Section 306 be construed to permit any exemptions which the states might choose to enact.

The Department's position in this regard is plainly untenable as shown by the well-reasoned and unanimous circuit court precedent against it. *See Trailer Train Company v. Leuenberger, supra; Department of Revenue, State of Florida v. Trailer Train Company, supra; Burlington Northern Railroad Company v. Bair, supra; Ogilvie v. State Board of Equalization, supra.*

As the courts have concluded, the language and structure of Section 306 simply do not admit of such a construction of Section 306(1)(d). As *Ogilvie* was the first to rule, the exclusion of exemptions from the analysis in a case under Section 306(1)(a) does not mandate a similar construction of Section 306(1)(d). In fact, the limited scope of Section 306(1)(a) is a strong reason why Section 306(1)(d) must be construed to apply to exemption cases if the Congres-

sional purpose to prohibit discrimination is not to be frustrated.

Section 306(1)(d) prohibits any tax which "results" in discrimination. The circuit courts have applied that provision to mean exactly what it says.

The Department's legislative history argument, which it presented in detail to the Ninth Circuit, is similarly flawed. Because there is no definitive legislative history on point, the Department resorts to isolated references in the legislative history and a loose chain of logic in an effort to narrow and restrict the scope of relief available under the plain language of Section 306. As the Petition itself candidly admits, similar attempts to narrow Section 306 in other cases have been rebuffed by the courts, mainly on the ground that the commands of Section 306 are so clear that resort to legislative history to resolve alleged ambiguities is improper and unnecessary. For example, in *Burlington Northern Railroad Company v. Oklahoma Tax Commission, supra*, this Court was invited by the State of Oklahoma to analyze certain statements in the legislative history of Section 306 to support the state's argument that federal courts were not allowed, under Section 306(1)(a), to inquire into the state's determinations of the value of railroad property. This Court rejected not only Oklahoma's conclusion but also its method of analysis. This Court stated:

> Legislative history can be a legitimate guide to a statutory purpose obscured by ambiguity, but "[i]n the absence of a 'clearly expressed legislative intention to the contrary,' the language of a statute itself 'must ordi-

> narily be regarded as conclusive.'" (citation omitted). Unless exceptional circumstances dictate otherwise, "[w]hen we find the terms of a statute unambiguous, judicial inquiry is complete."

481 U.S. at 461.

Section 306(1)(d) is similarly clear and unambiguous, as has been recognized by every court to interpret its meaning. Therefore, resort to portions of the legislative history to discover an alleged immunity for tax exemptions is unnecessary and inappropriate.

b. The Lower Courts Do Not Require Guidance.

The Petition argues that the Ninth Circuit decision has somehow "aggravated" a supposed "developing conflict among lower courts" in Section 306 cases. *See* Pet., p. 8. Indeed, the Department struggles mightily to suggest that confusion reigns among lower courts concerning the meaning of Section 306.

There is, however, no "developing" conflict. The "inconsistency, uncertainty, and conflict" which the Department perceives exist only in the distorted light of its own narrow and erroneous reading of Section 306.

The lower courts have in fact been quite consistent. Following this Court's holding in *Burlington Northern Railroad Company v. Oklahoma Tax Commission*, they have read and applied Section 306 by its plain and remedial meaning. They have refused to allow differing statutory schemes employed by the states to obfuscate Section 306(1)(d)'s clear prohibition against any tax which "results in discriminatory treatment." For example, it does not matter that a state may

choose to exempt based on the description of the property owned, rather than the identity of the taxpayer. In either case, continued taxation of railroad personal property must fail where significant amounts of other commercial and industrial personal property, regardless of the device used, escape taxation. The courts have refused to allow precisely what the Department now argues before this Court, which is that it somehow makes a difference in judging the "resulting" discrimination if a state uses different statutory schemes to achieve the same result—the exemption of significant amounts of commercial and industrial personal property, while continuing to tax railroad personal property in full.

The Department cites allegedly differing analyses among the circuits primarily by comparing the exemption cases to other kinds of Section 306 cases which present issues not raised by these facts and not before this Court.[7] The language and analyses of those cases were different than the Ninth Circuit's because the issues and taxes considered in those cases were completely different. However, any differences do not create conflict or confusion. Actually, all of those cases are consistent in finding that Section 306(1)(d) prohibits all discriminatory taxes.

The Petition even resorts to a ten-year old decision of a district court in the Ninth Circuit. *Trailer Train Company v. State Board of Equalization*, 538 F.Supp.

[7] Although many of the cases cited in fact demonstrate how broadly Section 306(1)(d) has been interpreted to prevent discriminatory taxes, they did not involve property tax exemptions. *See, e.g., Kansas City Southern v. McNamara, supra,*; *Alabama Great Southern Railway Co. v. Eagerton*, 663 F.2d 1036 (11th Cir. 1981); *Burlington Northern v. City of Superior, supra.*

509 (N.D. Cal. 1982). The reasoning of this decision has been unanimously and explicitly rejected by the appellate courts[8], and even by the district court in the instant case, which described that case's reasoning as "tautological." *See* App-30.

The Department similarly cites the state court's decision in *Richmond, Fredericksburg and Potomac Railroad Co. v. State Corporation Commission*, 230 Va. 260, 336 S.E.2d 896 (1985), a *per curiam* decision which held, without analysis or reference to case law, that Section 306(1)(d) does not apply to ad valorem property taxes. As the Petition admits, this decision has not been followed by any other case and is clearly an anomaly in the development of the case law. To suggest that this decision is causing conflict among the lower courts is ludicrous.

In a footnote, the Department suggests that the recent decision of the Sixth Circuit in *CSX Transportation, Inc. v. Tennessee State Board of Equalization*, 964 F.2d 548 (6th Cir. 1992), is at odds with the Ninth Circuit. That case, however, dealt solely with the appropriate standards and quantum of proof to decide when preliminary injunctions should issue under Section 306. Unlike this case, which was tried on *stipulated* facts, the qualitative and quantitative impact of exemptions in Tennessee was contested. The Sixth Circuit did not address the principles enunciated in *Ogilvie* and its progeny, but simply found no abuse of discretion in the district court's ruling that the plaintiff had not *factually* shown reasonable

[8] *See, e.g., Department of Revenue v. Trailer Train, supra*, 830 F.2d at 1573; *Trailer Train Company v. State Board of Equalization*, 710 F.2d 468, 471 (8th Cir. 1983).

cause to believe that a violation of the Act had occurred.

The Department's reliance on *Clinchfield Railroad Company v. Lynch*, 784 F.2d 545 (4th Cir. 1986), is puzzling and totally misplaced. The Department claims *Clinchfield* supports its assertion that Congress left the States free to grant exemptions without any resultant scrutiny under Section 306. The Fourth Circuit did make the statement quoted in the Petition that states are free to grant exemptions, but went on to observe, consistent with *Ogilvie*:

> But the problem is that if states are allowed to grant tax reductions to an increasing number of property items without taking into account the effect on the taxation of railroad property, the antidiscriminatory spirit and intent of §306 would soon be swallowed up in the exceptions.

See 784 F.2d at 552.

The Department also asserts that the lower courts somehow are plagued with uncertainty concerning the manner in which the discriminatory effect of exemptions should be determined, and the proper remedy for the discrimination. The Department is wrong on both counts, and simply desires to argue that the findings of the courts on the existence and extent of discrimination are wrong. The Department's characterization that the Ninth Circuit has established a "per se" rule which conflicts with the other circuits is totally unfounded. Nowhere in the Ninth Circuit's opinion does the phrase "per se" appear.

The Department's statement that the Eighth Circuit's decision in *Leuenberger* "does not fit comfortably" with the facts of this case is completely wrong, and is apparently based on the mischaracterization that only 31%-38% of the total commercial and industrial personal property in Oregon is exempt. *See* Pet., p. 23, footnote 27. This percentage includes *timber*, which both parties concede is *real* property under Oregon law. In fact, the stipulated facts support the finding that 67% of commercial and industrial personal property in Oregon is exempt.[9] Therefore, these facts square easily with *Leuenberger*, in which 75% of the personal property was stipulated to be exempt. Indeed, it is nearly impossible to distinguish the facts stipulated here from those in *Leuenberger*.

The remedies employed by the circuits to date have been consistently applied. Where, as here, most or all personal property is exempt, then the Carlines should not pay tax on their personal property. Where equity can be achieved by less than an injunction of all taxes, a proper remedy can be and has been crafted. *See, e.g., Burlington Northern v. Bair, supra* (applying equal valuation limitations and credits to railroad property).

The Department may criticize and condemn as inappropriate the conclusions of discrimination and remedies reached by the courts to date, but it cannot legitimately claim conflict, inconsistency, or uncertainty.

c. The Implications of the Decision Below for State Taxing Authorities are Over-Stated and Irrelevant.

The Department indulges in extensive and somewhat extravagant predictions concerning the effect of

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[9] *See* Ninth Circuit table, App-18. The total value o personal property is $14.5 billion, of which exempt personal property is $9.7 billion, or 67%.

the holding here on claims by railroads, and perhaps others, to be free from discriminatory taxation in Oregon and elsewhere. These predictions are over-stated and irrelevant.

Although the Ninth Circuit had only the issue of the Carlines' personal property before it, the Department predicts that the Ninth Circuit's decision will support the conclusion that the real property of railroads must also be protected from tax. Whether this ruling will develop in the Ninth and other circuits remains to be seen, but so far, attempts by the railroads to expand the holding of the case below to real property claims have been unsuccessful.[10] In any event, such prognostication does not support review of the Ninth Circuit's decision at this time. Such an issue is for another case on another day, and presents an issue which should be allowed to develop in the lower courts.

The Petition's reference to the "eruption of litigation" following the decision below is a gross exaggeration. The airline litigation referenced in the Petition was already on file in Oregon prior to the Ninth Circuit's decision, and the airlines had protested payment of their taxes in Washington long before this case was decided. Similarly, railroad litigation was already in progress in Washington. The litigation did not emerge from the decision below—

[10] For example, the Petition cites the current litigation between Burlington Northern Railroad Company and the Department of Revenue of the State of Washington. *See* Pet., p. 27, footnote 35. The trial judge in those cases has so far denied any preliminary relief sought on the theory that the case below prohibits the taxation of railroad real property in Washington.

these cases arose in response to intolerably discriminatory tax systems.

Finally, the Petition predicts that few statutory schemes can withstand analysis pursuant to the Ninth Circuit's view of Section 306(1)(d). This is most probably a gross overstatement and definitely is premature at this point. In any event, such an impact argument is quite irrelevant to any proper issue under Section 306. By its very nature, Section 306 was intended to have an impact on the states' taxing policies and practices. Certainly, it restricts the freedom which states would otherwise have to discriminate against railroads and rail property. In enacting Section 306, Congress determined in the national interest that tax discrimination against the rail industry should be prohibited whatever the impact on states. As this Court has observed in response to a similar appeal to practical consequences: "These are policy considerations which may have weighed heavily with legislators who considered [Section 306]. It should go without saying that we are not free to reconsider them now."[11] If impact on the states is enough to warrant review in a Section 306 case, then this Court must review every Section 306 case because each case will involve such impact.

The Petition complains that Section 306 jurisprudence develops on a "case-by-case, dispute-by-dispute basis." *See* Petition at p. 15. This is precisely how the law should develop. To date, the law is clear that Section 306(1)(d) is violated where railroad personal property is taxed, and significant amounts of other

[11] *Burlington Northern v. Oklahoma Tax Commission, supra,* 481 U.S. at 1464.

commercial and industrial personal property are exempted from taxation. No conflict exists on that point.

Ultimately, although the point is argued here, whether the Ninth Circuit's decision is correct is not an appropriate consideration for purposes of granting a writ of certiorari. For present purposes, it is enough to note that the Ninth Circuit's decision is consistent with, and in fact embraces the analysis employed by the other circuits in determining claims of discrimination due to statutory exemptions. This Court has previously allowed questions under Section 306 to fully mature and result in conflict before granting a Writ of Certiorari. There is no reason to abandon that approach.

CONCLUSION

Although Section 306 is important legislation, the issue raised in this case does not warrant review by this Court. The Petition does not present any ground for granting certiorari under Rule 10 of the Rules of this Court and should be denied.

Respectfully submitted,

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